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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 140

VILLAGE OF HAVERSTRAW,
Petitioner,

against

CLYDE POTTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

VILLAGE OF HAVERSTRAW, Petitioner, against CLYDE POTTS, Respondent.	}	No.

PETITION FOR A WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Village of Haverstraw, a municipal corporation duly organized and existing under the laws of the State of New York, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the determination of that court affirming a judgment of the District Court for the Southern District of New York in favor of respondent against petitioner in the sum of $4,373.68.

The opinion of said court was filed on February 26th, 1940, is reported in 110 Fed. (2d) 58, and is printed as an appendix to the brief submitted herewith.

A transcript of the record, including the proceedings in the said Circuit Court of Appeals, is furnished herewith in accordance with rule 38 of this court.

Summary and Short Statement of the Matter Involved.

Nature of Suit and Decisions Below.

In 1928, petitioner's trustees were considering the installation of a municipal water supply system. They appointed a committee to employ an engineer to make a preliminary survey at a cost not to exceed $800. Negotiations between this committee and respondent resulted in a written contract dated July 2nd, 1928, which employed respondent, not preliminarily only, but for every phase of the work, on the basis of 7% of the cost of construction.

Respondent rendered some services and submitted a report. Following the report the trustees authorized the project subject to a referendum to the electors of the village. The proposition as submitted to the electors was whether the village should "establish a water works system costing not over $450,000", to be paid for by a 40 year bond issue.

On September 20th, 1928, the electors voted approval.

Thereupon, pursuant to the New York Conservation Law, a proceeding to procure the approval of the project by the State Water Power & Control Commission was initiated, and hung fire for nearly two years. The project was then formally abandoned by petitioner following a vote of the electors approving such abandonment.

Thereupon, on June 12th, 1931, respondent brought this action seeking damages for the breach of said written contract of July 2nd, 1928.

Upon this cause of action, he recovered a verdict of $17,000. Upon appeal, the Circuit Court of Appeals reversed the judgment on said verdict (79 Fed. (2d) 102; R. 96) holding that the complaint should have been dismissed because the contract of July 2nd, 1928 was invalid for violation of section 128-a of the Village Law (printed in full at p. 13, *post*), providing that no contract involving an expenditure

should be made unless the money therefor had first been appropriated.

However, the court suggested, although explicitly withholding decision thereon, that perhaps respondent might be entitled to recover on *quantum meruit* for certain of the services actually rendered, and granted him leave to apply to the District Court to amend his complaint accordingly.

Prior to so moving and in purported compliance with subdivision 21 of section 89 of the Village Law (printed at p. 9, *post*) respondent on April 15th, 1936, filed with petitioner two bills for his alleged services, demanding a total of $15,829.46.

Thereafter, on June 8th, 1936, plaintiff moved in the District Court for leave to amend his complaint to sue upon these two bills, which motion was granted by order dated August 22nd, 1936. The amended complaint was served on October 10th, 1936.

Upon petitioner's motion before answer, based upon various grounds, the District Court dismissed the amended complaint by order dated February 5th, 1937.

Upon respondent's appeal therefrom, the Circuit Court of Appeals (93 Fed. (2d) 506, R. 105) reversed the dismissal and remanded the case for further proceedings.

Thereafter, upon petitioner's answer to respondent's second amended complaint setting forth a single cause of action upon *quantum meruit* to recover said $15,829.46, the action again went to trial resulting in a verdict in favor of respondent of $3,500.

Upon petitioner's appeal from the judgment upon said verdict, the same was affirmed and petitioner seeks certiorari to review such affirmance.

In the court below, petitioner limited its appeal to three points thought to be decisive of the case (R. 41):

1. That subdivision 21 of section 89 of the Village Law had not been complied with since the bills upon which the

recovery was founded had been filed on April 1936, more than five years after the commencement of the action on June 12th, 1931.

2. That since the services sued for had admittedly been rendered pursuant to the illegal contract of July 2nd, 1928, no recovery could be had therefor even upon *quantum meruit*.

3. That all recovery was barred by the New York six year statute of limitations because no services had been rendered after June 8th, 1930, six years before the motion to amend the complaint made June 8th, 1936.

The Circuit Court of Appeals held with respect to

(1) that the filing of the bills more than 30 days before the amendment of the complaint sufficiently complied with the statute even though such filing was subsequent to the actual commencement of the action;

(2) that the vote of the electors of September 20th, 1928 authorized a recovery for the services rendered after that date; and

(3) that it could not say as matter of law that the statute of limitations had run.

Reason Relied Upon for Allowance of Writ.

We believe that the decision below upon important questions of local New York law is in direct conflict with New York decisions directly and distinctly applicable.

1. The decision below on the first of the above enumerated points is in direct conflict with *McGovern* v. *City of New York*, 160 Misc. 714, affd. 247 App. Div. 775, affd. 272 N. Y. 455.

2. The decision below on the second point is in direct conflict with a uniform line of New York decisions, e.g.: *Donoran* v. *The Mayor*, 33 N. Y. 291; *McDonald* v. *The Mayor*, 68 N. Y. 23; *Hart* v. *City of New York*, 201 N. Y. 45; *Wakefield* v. *Brophy*, 67 Misc. 298, affd. 144 N. Y. 905.

The two foregoing questions are questions of the greatest importance in the field of law involving municipalities.

1. It is almost universally true that before action may be brought against a municipality a bill or claim therefor must be formally submitted to the municipality. This is conceived to be essential to the orderly administration of a municipality's affairs. The decision below is, we believe, unprecedented. Since it is direct conflict with a New York decision squarely in point, it ought to be reviewed.

2. The second question is of even greater importance. The effort to prevent not only municipalities but most legislative bodies from spending money unless and until they provide the money therefor has been continuous and insistent for many years. Recognizing the sound public policy of such statutes, the courts have uniformly held that such laws will not be permitted to be circumvented by allowing recoveries on *quantum meruit* for services rendered under contracts illegal for violation of such statutes. The decision below runs counter to this continuous, well settled and sound rule of public policy. For this reason, as well as the fact that here again it is in direct conflict with New York decisions squarely in point, it ought to be reviewed.

3. The third point, while not of as great public importance as the first two, is, we think, of sufficient consequence to justify the attention of this court, particularly if the first two questions are reviewed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court for hearing and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered 202, entitled Clyde Potts, appellee, against Village of Haverstraw, appellant, and that the said judgment of the United States Circuit Court of Appeals for the Second Circuit be reversed by this honorable court and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just, and your petitioner will ever pray, etc.

Dated, June 7th, 1940.

VILLAGE OF HAVERSTRAW,
By MONROE J. CAHN,
WARNER PYNE,
Counsel for Petitioner.

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded, and the case is one in which the prayer of the petitioner for a writ of certiorari should be granted by this Court.

Dated, June 7th, 1940.

MONROE J. CAHN,
WARNER PYNE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

VILLAGE OF HAVERSTRAW,
Petitioner,

against

CLYDE POTTS,
Respondent.

No.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 110 Fed. (2d) 58.

Jurisdiction.

The grounds for jurisdiction are:

1. The mandate of the Circuit Court of Appeals for the Second Circuit was filed on March 13th, 1940.

2. The judgment was rendered in an action at law.

3. Jurisdiction is invoked under section 240(a) of the Judicial Code, 28 U. S. C. A. section 347, as amended.

Statement.

The facts are stated in the petition.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is granted are that the Circuit Court of Appeals for the Second Circuit erred in holding

1. That subdivision 21 of section 89 of the Village Law was complied with by the filing of respondent's bills after the commencement of the action.

2. That recovery could be had for any of the services rendered in attempted compliance with the contract of July 2nd, 1928, specifically for those rendered after September 20th, 1928.

3. That the action was not barred by the statute of limitations.

Summary of Argument.

1. UNDER THE PROVISIONS OF SUBDIVISION 21 OF SECTION 89 OF THE VILLAGE LAW, THE FILING OF PLAINTIFF'S BILLS PRIOR TO THE SERVICE OF THE SUMMONS WAS A CONDITION PRECEDENT TO THE MAINTENANCE OF THE ACTION; SINCE CONCEDEDLY THEY WERE NOT FILED UNTIL FIVE YEARS THEREAFTER, THE COMPLAINT SHOULD HAVE BEEN DISMISSED.

2. UNDER SECTION 128(a) OF THE VILLAGE LAW, THE CONTRACT OF JULY 2nd, 1928 WAS ILLEGAL AND VOID, AS THE CIRCUIT COURT OF APPEALS ADJUDICATED ON THE FIRST APPEAL; SINCE TO PERMIT RECOVERY FOR SUCH SERVICES UPON ANY THEORY WOULD DESTROY THE OBVIOUS PURPOSE OF THE STATUTE RECOVERY THEREFOR IS DENIED BY NEW YORK LAW WHETHER SOUGHT UNDER THE CONTRACT OR UPON QUANTUM MERUIT.

3. ASSUMING, ARGUENDO, THAT AFTER THE APPROVING VOTE OF SEPTEMBER 20, 1928, PETITIONER MIGHT LAWFULLY HAVE EMPLOYED RESPONDENT TO RENDER CERTAIN SERVICES, THE MERE EXISTENCE OF SUCH POWER, NEVER EXERCISED, COULD NOT VALIDATE, EVEN IN PART, THE ILLEGAL CONTRACT OF JULY 2nd, 1928 NOR SUPPORT A RECOVERY FOR SERVICES CONCEDEDLY RENDERED THEREUNDER.

4. SINCE AS THE CIRCUIT COURT OF APPEALS HELD RESPONDENT HAD NO CONTRACT IMPLIED IN FACT, AND CONCEDEDLY HE HAD NO VALID EXPRESS CONTRACT, THERE WAS NO BASIS FOR THE RULING THAT RESPONDENT HAD A CONTINUING CONTRACT WHICH TOLLED THE STATUTE OF LIMITATIONS UNTIL RESPONDENT WAS DISCHARGED. THERE BEING AT MOST ONLY A CONTRACT IMPLIED IN LAW, THE STATUTE OF LIMITATIONS RAN FROM THE TIME THE SERVICES WERE RENDERED, BARRING ANY RECOVERY.

POINT I.

Under the provisions of subdivision 21 of section 89 of the Village Law, the filing of plaintiff's bills prior to the service of the summons was a condition precedent to the maintenance of the action; since concededly they were not filed until five years thereafter, the complaint should have been dismissed.

Section 89 of the Village Law enumerates the general powers of the board of trustees of a village and section 21 thereof, dealing with the auditing of bills, provides that such board:

> "Shall audit all bills and accounts and all claims for damages against the village * * *, but no bill or account against the village or any such board or boards for property purchased, materials furnished, services rendered, or disbursements shall be audited or paid, nor shall an action be brought thereon unless such bill or account

> shall be made out in items, and properly dated with an affidavit attached thereto by the person * * * presenting or claiming the same, that the items of such bill or account are correct, that the services and disbursements charged therein have been in fact rendered or paid, and that no part thereof has been paid or satisfied * * * No action shall be brought upon any such bill or account within thirty days from the time the same was presented to the board authorized to audit the same * * *"

Concededly, this action was commenced on June 12th, 1931 (R. 38) and the bills upon which the action is presently founded were not filed until April 15th, 1936 (R. 38).

McGovern v. *City of New York*, 160 Misc. 714, affd. 247 App. Div. 775; 272 N. Y. 455, is directly contrary to the ruling below.

In that case, plaintiff filed his claim with the city on September 12th, 1934. Two days later, September 14th, 1934, he served the summons in his action. On October 17th, 1934 he served his complaint, alleging, in intended compliance with section 261 of the Charter of the City of New York, that he had presented his claim on September 12th, 1934, that the same had not been paid and that more than thirty days had elapsed since such presentment. The Special Term expressly held that the presentment thirty days before the service of the complaint did not comply with the statute; that compliance would result only from such filing more than thirty days before the service of the summons, saying (p. 715):

> "The contention of the plaintiff that the thirty days must have elapsed before the complaint rather than before the summons cannot be sustained. It would lead to the conclusion that the claim or demand may be presented even after the summons has been served, if only by the time of the service of the complaint the plaintiff makes an allegation that thirty days have elapsed since the serving of the claim. Such construction might lead

to extreme results. A summons and complaint might be served before the demand was made. The demand might thereafter be made, and by voluntary extensions of time to serve an amended complaint, or by leave of court the complaint might be amended so that it might then truthfully state that the demand had been served and not complied with. Such result or similar results would remove entirely the protection afforded to the city by this charter provision."

A reference to the case on appeal and the briefs of counsel reveals a most exhaustive examination and discussion of the law by both sides. The case was a hard one as the plaintiff had served the summons two days after filing the claim in order to prevent the operation of a short statute of limitations in the contract upon which he sued. Nevertheless, the Special Term, the Appellate Division and the Court of Appeals unanimously agreed that the statute had not been complied with and this despite the fact, as the plaintiff insistently pointed out, that the charter requirement did not expressly prohibit the institution of an action but merely that no action "shall be prosecuted or maintained" within the thirty days. The much sought distinction between the institution and prosecution or maintenance of the action was refused. That case is therefore directly controlling here since the sufficiency of the filing was the sole point involved.

The distinction between that case and this sought to be made by the court below is, we think, quite unsound. Whereas, as indicated above, that was a hard case, calling for all possible consideration, this was not for, as the court below points out, here the commencement of a new action would have involved nothing more oppressive than the payment of costs. There was, therefore, no occasion to indulge in judicial legislation with respect to words of plain and certain meaning.

In *Reinig* v. *City of Buffalo*, 102 N. Y. 308, a leading case on the subject, the court said (p. 311):

> "The language is 'that no action' 'shall be brought' until, etc., and constitutes an express prohibition against the action, until performance of the condition."

The courts of New York have uniformly held that the statutory conditions precedent to municipal liability must be complied with as written.

In *Ponsrok* v. *City of Yonkers,* 254 N. Y. 91, in holding a notice of claim fatally defective, the court said (p. 95):

> "The fact that the city has not been prejudiced is immaterial. The court may not exercise a dispensing power based on the principles of abstract justice fitting the particular case. It may only see that the requirements of the law are complied with. A notice of claim is not 'verified by the oath of the claimant' when the affidavit is subscribed not by the claimant but by the notary and the jurat is not subscribed by the notary and is attested only by his official seal."

See also

MacMullen v. *City of Middletown*, 187 N. Y. 37, 40-42;

Winter v. *City of Niagara Falls,* 190 N. Y. 198, 202-204;

Casey v. *City of New York*, 217 N. Y. 192, 195-198;

Kaplan v. *City of Poughkeepsie*, 279 N. Y. 153.

POINT II.

Under section 128(a) of the Village Law, the contract of July 2nd, 1928 was illegal and void, as the Circuit Court of Appeals adjudicated on the first appeal; since to permit recovery for such services upon any theory would destroy the obvious purpose of the statute recovery therefor is denied by New York Law whether sought under the contract or upon *quantum meruit*.

Section 128(a) of the Village Law provides:

> "No contract shall be made involving an expenditure by the village unless the money therefor has previously been estimated by the Board of Trustees as necessary to be raised during the then fiscal year, or unless a resolution to borrow money on bonds or other obligations of the village has been adopted by the Board of Trustees, as provided in this chapter or if required by this chapter that the action or resolution of the Board of Trustees be approved by the electors, then by such approval or if such action or resolution is subject to a permissive referendum as provided for in this chapter then not until thirty days after its adoption nor until approved by the affirmative vote of a majority of the qualified electors of such village voting on a proposition for its approval if within thirty days after its adoption there be filed with the village clerk a petition as provided for in article five-a of this chapter, or if authorized by an affirmative vote of the electors of said village in accordance with the provisions of this chapter, or unless otherwise available or specifically provided for by this chapter."

Upon the first appeal in holding that the contract of July 2, 1928 was invalid for violation of this statute, Judge Learned Hand said (R. 99):

"This was intended to forbid villages to contract obligations without providing the means of payment; * * *"

He further said (R. 104):

"Section 128(a) may forbid any recovery even on a quantum meruit * * *"

Upon the appeal below it was stipulated (R. 38):

"2. All of the services rendered by plaintiff were in attempted compliance with the said contract of July 2, 1928 * * *"

It follows that the recovery herein indirectly compensates respondent for services for which compensation was denied when sought directly on the contract at the first trial.

That the statute may not thus be readily frustrated has been the uniform ruling of the courts of New York in this class of cases as well as of other courts.*

McDonald v. *Mayor*, 68 N. Y. 23, was an action to recover the value of certain material used in the repair of city streets. Plaintiff failed to prove compliance with statutory requirements that the necessity for the materials be certified by the head of the Department of Public Works, the expenditure authorized by the common council and the contract entered into by the appropriate head of the department upon sealed bids after public notice. Liability was sought to be imposed

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* *Bonesteel* v. *Mayor*, 22 N. Y. 162, 170; *Donovan* v. *Mayor*, 33 N. Y. 291, 293; *Wakefield* v. *Brophy*, 67 Misc. 298, affd. 144 App. Div. 905, affd. 207 N. Y. 772; *Ford* v. *Mayor*, 63 N. Y. 640; *McDonald* v. *Mayor*, 68 N. Y. 23, 28; *Parr* v. *Village of Greenbush*, 72 N. Y. 463, 472; *Dickinson* v. *City of Poughkeepsie*, 75 N. Y. 65, 75; *Smith* v. *City of Newburgh*, 77 N. Y. 130, 136; *Kramrath* v. *City of Albany*, 127 N. Y. 576, 582; *Village of Fort Edward* v. *Fish*, 156 N. Y. 365, 371-373; *Matter of Niland* v. *Bowron*, 193 N. Y. 180; *Hart* v. *City of New York*, 201 N. Y. 458; *Lindlots Realty Corp.* v. *County of Suffolk*, 278 N. Y. 45, 52; *Scarborough Prop. Corp.* v. *Village of Briarcliff Manor*, 278 N. Y. 370, 375; *Edison El. Co.* v. *Pasadena*, 178 Fed. 425; *Perry W. L. & I. Co.* v. *Perry*, 29 Okla. 593, 120 Pac. 582; *Gutta Percha & R. M. Co.* v. *Village of Ogalalla*, 40 Neb. 775, 59 N. W. 513; *Johnson County S. B.* v. *City of Creston*, 212 Iowa 929, 231 N. W. 705; Restatement Law of Contracts, section 598; 84 A. L. R. 926.

upon implied contract because of the use of plaintiff's materials. In holding otherwise, the court said (p. 28):

> "Here there is an express legislative inhibition upon the city, that it may not incur liability unless by writing and by record. How can it be said that a municipality is liable upon an implied promise, when the very statute which continues its corporate life, and gives it its powers, and prescribes the mode of the exercise of them, says, that it shall not, and hence cannot, become liable, save by express promise? Can a promise be implied, which the statute of frauds says must be in writing to be valid? How do the cases differ? The Bank of the United States v. Danbridge (supra), which is a leading case upon the doctrine of the liability of a corporation aggregate, upon a promise implied, holds, as we have already said, that if the charter imposes restrictions upon the manner of contracting, they must be observed. And the California cases above cited, concede the same. It is plain, that if the restriction put upon municipalities by the legislature, for the purposes of reducing and limiting the incurring of the debt and the expenditure of the public money, may be removed, upon the doctrine now contended for, there is no legislative remedy for the evils of municipal government, which of late have excited so much attention and painful foreboding. Restrictions and inhibition by statute are practically of no avail, if they can be brought to naught by the unauthorized action of every official of lowest degree, acquiesced in, or not repudiated, by his superiors. * * * This opinion goes no further than to hold, that where a person makes a contract with the city of New York for supplies to it, without the requirements of the charter being observed, he may not recover the value thereof upon an implied liability."

Dickinson v. *City of Poughkeepsie*, 75 N. Y. 65, was an action to recover on a contract or, in the alternative, upon *quantum meruit*. The contract was held to be illegal because of failure to observe the statutory requirements to let

the contract to the lowest bidder. In holding that no recovery could be had in *quantum meruit*, the Court said (pp. 74, 75):

> "A promise to pay cannot be implied, where there is no power to contract. (Burrill v. Boston, 2 Clifford, 590; Dillon on Mun. Corp., section 383).
>
> Nothing could be more futile than the prohibition of the making of a contract except with the lowest bidder, if the contract having been made in direct violation of this prohibition, it could be rendered valid merely by being persisted in by both parties, contrary to public policy and the law. If the execution of a contract, the making of which is prohibited, as against public policy, absolutely cures its invalidity, a mere continuance in violation of law would have certainly a strange result. It is difficult to see what use or force there could be in such prohibitions, so general as to municipalities and so much a part of our policy in this State, if the consummation of their violation brings with it the protection of the law and a right of action for payment upon the void contract. The contrary we understand to be settled by adjudication. (Hodges v. Buffalo, 2 Den., 110; Brady v. New York, 20 N. Y., 312; Halstead v. New York, 3 Comst., 430; McDonald v. New York, 68 N. Y., 23; Cowen v. West Troy, 43 Barb., 48; Dillon on Mun. Corp., section 385).
>
> * * * * * * *
>
> With regard to the first ground of recovery upon a quantum meruit the point seems to be settled adversely to the plaintiffs by authority. The cases generally hold that there can be no recovery against a municipality for services performed upon a contract void for want of power to make it, although performed upon the property of the municipality, and of which they have the benefit. As was said in Burrill v. Boston (2 Clifford, supra), there can be no implied promise to pay upon a quantum meruit, where there is no power to contract, either expressly or impliedly, except upon a written contract with the lowest bidder after advertisement.

(See Bonesteel v. New York, 22 N. Y., 162; Brady v. New York, supra; Hodges v. Buffalo, supra; McDonald v. New York, supra.)"

In *Lindlots Realty Corp.* v. *County of Suffolk*, 278 N. Y. 45, plaintiff brought an action to rescind certain purchases of real property for misrepresentation as to the sufficiency of title and to recover the price paid therefor. In holding that the action could be sustained, the court thus adverted to the rule effective here (p. 52):

> "Assuming, however, that the defense is here on the merits, it is undisputed that a municipality cannot be made liable for breach of contract, or services rendered, or sales price, or even for use and occupation of property acquired, when an official of the municipality has exceeded his power of authority. (Village of Fort Edward v. Fish, 156 N. Y. 363; Donovan v. Mayor, 33 N. Y. 291; Supervisors of Rensselaer County v. Bates, 17 N. Y. 242.)"

That the rule here invoked applies to the whole field of municipal contracts was illustrated by the recent case of *Scarborough Prop. Corp.* v. *Village of Briarcliff Manor*, 278 N. Y. 370. The plaintiff had dedicated certain streets to the defendant on condition that defendant refund to plaintiff the cost of improvements therein. This, the village trustees had agreed to do. However, the village resisted the action to recover this sum on the ground that the agreement to refund was beyond the power of the trustees. In defeating recovery, the court said (p. 375):

> "The defendant village has only those powers which the Legislature has conferred upon villages of the third class, and the powers so conferred upon the village may be exercised only in the manner provided by the Village Law, and through the officers authorized by the statute to act for the village. The power of a village to enter into contracts and to incur financial obligations is subject to statutory conditions and restrictions in-

tended to protect the inhabitants and taxpayers against ill-considered or extravagant action."

Since, therefore, respondent's services were rendered in performance of the invalid contract, no recovery upon *quantum meruit* was authorized.

The court below, while expressing some doubt, assumed that ordinarily this rule would have barred any recovery by respondent. It held, however, that the rule had no application to the services rendered after September 20th, 1928 because the electors then approved the project.

POINT III.

Assuming, arguendo, that after the approving vote of September 20, 1928, petitioner might lawfully have employed respondent to render certain services, the mere existence of such power, never exercised, could not validate, even in part, the illegal contract of July 2nd, 1928, nor support a recovery for services concededly rendered thereunder.

In sustaining the recovery, the court below assumed

> "that the referendum did not ratify the employment either from August 8th or from September 4th. * * * We may so proceed because the second of the defendants' three points on appeal is that the plaintiff cannot recover anything whatever for services rendered under the 'illegal contract'; and that is certainly untrue as to those rendered after September 20th."

The reason for this was stated earlier in the opinion to be that approval of the project authorized the trustees to present an application to the Water Power & Control Commission and

> "the earlier unauthorized attempt to contract with the person so employed did not prevent the law from raising an obligation to pay him, * * *".

No authority for this proposition is cited.

Not only is it opposed to the uniform line of decisions heretofore cited but it requires a fiction to sustain it.

The fiction is twofold: (a) that pursuant to the authority resulting from the vote, respondent was employed, and (b) that respondent would have rendered services to the limited extent thereby authorized.

The first of these fictions is self evident. The difficulty which it entails is apparent from the statement of the court below that the contract is implied not in fact but in law and that

> "* * * it is precisely when both parties are mistaken, that the law raises an obligation ex aequo et bono in its place."

By this holding, the court did precisely what the authorities heretofore cited have held would not and should not be done, viz., raise up an implied contract to defeat the salutary principle of the statute.

The vice of the second fiction may be as readily exposed. Upon the first appeal, the court below pointed out (R. 100) that the vote of the electors authorized the trustees to go no further than to employ help in the proceeding before the Water Power & Control Commission. *Non constat* that respondent would have accepted such limited employment (cf. R. 103).

That the electors' approval of the project was no ratification or approval of respondent's employment, past, present or future, follows from two facts, (1) the electors had no power so to ratify, (2) ratification was not submitted to them. The limitation upon petitioner's power to contract imposed by section 128-a was an act of the Legislature of

the State of New York, and it alone had power to ratify the illegal act. It did not give such power to the electors of the village. Section 221 of the Village Law, under which the referendum was held, provides:

> "The board of trustees of any village may by resolution adopted at a regular meeting, determine upon the establishment of a system of water works for supplying the village and its inhabitants with water, or for the acquisition of an existing private system, at an expense in either case not exceeding the sum stated in the resolution; except that if the resolution expressly authorized the condemnation of an existing private system, under the provisions of subdivision two of section two hundred and twenty-two the expense of acquisition by condemnation need not be stated. Such action shall be subject to a permissive referendum as hereinbefore defined."

As contemplated by this section, the only matter submitted to the electors was authorization of the project, the proposition on the ballot being as follows (R. 54):

> "Shall the Village of Haverstraw establish a waterworks system costing not over $450,000 and issue its bonds to pay such cost and raise annually by tax money to pay such bonds in 40 annual installments with interest, as proposed?"

Can it be seriously argued that that proposition presented respondent's contract or employment to the electors for their approval or ratification? Not even the circular explaining the project (R. 55), prepared by respondent, despite its elaborate detail, made any reference to the contract. The statement therein (R. 56) that respondent "had designed a complete new system and estimated the cost of construction and operation" was no notice that a continuing and partially unfulfilled contract was up for approval or ratification. There was no notice to the electors that they were called upon to act with regard to an irregular contract, the

terms of which would bind the Village irrespective of whether the project was authorized by the Water Power & Control Commission or ultimately constructed. No principle is more thoroughly settled than that there can be no ratification without clear, definite notice of all relevant facts.

Smith v. *Kidd*, 68 N. Y. 130;
Bierman v. *City Mills Co.*, 151 N. Y. 482;
Corrigan v. *Bobbs-Merrill Co.*, 228 N. Y. 58;
Bloomfield v. *Charter Oak Nat. Bank*, 121 U. S. 121;
Western Nat. Bank v. *Armstrong*, 152 U. S. 346.

Moreover, the case was not submitted to the jury on the theory that the vote of September 20th ratified the contract of July 2nd and thus authorized a recovery. The court charged that the jury must disregard the writing (R. 70, 80) and must find an implied obligation in the vote of September 20th to pay respondent for services to that time (R. 72). To this theory, petitioner excepted (R. 79, 80). At petitioner's request, the court expressly charged (R. 87):

> "The proposition as submitted to the voters on September 20, 1928 did not include approval or disapproval of plaintiff's contract of July 2nd, 1928."

There is a further fundamental objection to the use of the September 20th vote to support respondent's recovery. It was not the basis upon which plaintiff rendered any of his services. The sole basis was the illegal contract (p. 38). Since the contract was the sole consideration, the recovery must stand or fall upon it. The applicable rule was thus stated by Judge Cardozo in *McGovern* v. *City of New York*, 234 N. Y. 377, in the following prior decisions of this Court (pp. 388-389):

> "'Nothing is consideration,' it has been held, 'that is not regarded as such by both parties.' (Philpot v. Gruninger, 14 Wall. 570, 577; Fire Ins. Assn. v. Wick-

ham, 141 U. S. 564, 579; DeCicco v. Schweizer, supra, at p. 438). The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough (Fire Ins. Assn. v. Wickham, supra). Promisor and promisee must have dealt with it as the inducement to the promise (Holmes Common Law, p. 292; Wisconsin & Mich. Ry. Co. v. Powers, 191 U. S. 379, 386; 1 Williston, Contracts, section 139, p. 309)."

The fact that some other valid consideration might possibly have been adopted, which would have authorized a recovery, cannot, by the use of a fiction, be availed of to enable plaintiff to escape from the consequences of what was in fact illegal consideration.

And since the consideration upon which plaintiff rendered his services was the indivisible (79 Fed. (2) at p. 104), illegal contract of July 2nd, the taint of that contract invalidates any portion of that contract which might possibly have been good, if it stood alone.

Restatement, Law of Contracts, Section 607:
Hazelton v. *Sheckells,* 202 U. S. 71, 78;
Foley v. *Speir,* 100 N. Y. 552;
Central New York Tel. & Tel. Co., v. *Averill,* 199 N. Y. 128;
Manson v. *Curtis,* 223 N. Y. 313;
Angresam v. *Tozzi,* 217 App. Div. 642, affd. 245 N. Y. 558.

No matter how ingeniously the arguments may be contrived, escape is impossible from the fact that the services were rendered under the illegal contract and that to whatever extent compensation therefor may be granted, to that extent the purpose of the prohibition of section 128(a) will be thwarted.

POINT IV.

Since as the Circuit Court of Appeals held respondent had no contract inplied in fact, and concededly he had no valid express contract, there was no basis for the ruling that respondent has a continuing contract which tolled the Statute of Limitations until respondent was discharged, there being at most only a contract implied in law, the Statute of Limitations ran from the time the services were rendered, barring any recovery.

The motion to amend to set up the new cause of action on *quantum meruit* was made June 8, 1936 (R. 1).

Concededly, the applicable New York statute of limitations is a six year statute (R. 107). If the last item of service is controlling then unless services were rendered after June 8th, 1930 the claim is barred. This the court below stated on the second appeal (R. 107-108).

It held, however, that if the nature of respondent's employment was a continuing contract, the rendition of services would not necessarily be controlling unless fully performed; if only partially performed the statute might not begin to run until there was either full performance or discharge (R. 108-109).

Since the second appeal was heard on the pleadings alone and the illegality of respondent's original employment was not considered, the case was remanded for trial.

It is conceded (R. 38) that "all of the services" were rendered under the illegal contract. There was, therefore, as the court below held, "no contract implied in fact." The recovery was sustained upon one implied in law "ex aequo et bono."

In view of this ruling it is difficult to follow the holding below on the question now being considered.

If there was contract implied in fact there was no continuing contract except the illegal contract of July 2nd, 1928 which could not be the basis of any liability whatever. Nor could it be the basis for a continuing contract.

Thacher v. *N. Y. W. & B. Ry. Co.*, 153 App. Div. 186, 189-190.

Conclusion.

For the foregoing reasons, it is submitted that this cause involves questions of law of great importance to municipalities, with respect to which the court below has ruled in direct contradiction to positive and applicable decisions of the highest court of the State of New York, a conflict which this court should resolve.

It is therefore respectfully submitted that the case justifies the issuance of a writ of certiorari.

Respectfully submitted,

MONROE J. CAHN,
WARNER PYNE,
Counsel for Petitioner.

Appendix.

POTTS v. VILLAGE OF HAVERSTRAW.
No. 202.

Circuit Court of Appeals, Second Circuit.
Feb. 26, 1940.

L. HAND, *Circuit Judge.*

This action comes to us now upon a third appeal, this time by the defendant from a judgment in favor of the plaintiff on a quantum meruit. On the first appeal (2 Cir., 79 F.2d 102) we held that the contract of July 2, 1928, was invalid, because it had been executed before the resolution of the trustees was passed on September 4, 1928, or had been ratified by referendum of September 20th; but we suggested that possibly the plaintiff might recover on a quantum meruit. On the second appeal (2 Cir., 93 F.2d 506) we held that he was not necessarily barred by the Statute of Limitations (Civil Practice Act N. Y. § 48, subd. 1) because on the trial it might appear that his work had not been terminated more than six years before he amended his complaint; and because § 89(21) of the Village Law (Consol. Laws, c. 64) did not prevent a claimant from "presenting" a "bill or account" after the original cause of action had been dismissed, or from introducing by amendment a new cause of action thirty days thereafter. On the third trial the judge took a verdict upon a quantum meruit, in which he left it to the jury to appraise the value of the plaintiff's services from the beginning of his actual work, August 8, 1928, down to the time when the village by resolution finally discontinued the undertaking on February 10, 1931. The case comes to us under Rule 75(d), 28 U.S.C.A. following section 723c; that is, not upon "the complete record and all the proceedings and evidence in the action"; and the defendant, as required, served with its designation "a concise

statement of the points on which" it "intends to rely on appeal." These are three.

1. That the filing by plaintiff with the defendant of the notices of claim upon which the action is founded under the amended and second amended complaints, subsequent to the actual commencement of the action, was an insufficient compliance with the requirements of subdivision 21 of section 89 of the Village Law of the State of New York.

2. That no recovery could be had by plaintiff on quantum meruit since the services for which recovery was sought had admittedly been rendered under and pursuant to the contract of July 2, 1928, adjudged by the United States Circuit Court of Appeals for the Second Circuit to be an illegal contract.

3. That any recovery by the plaintiff was barred by the statute of limitations for the reason that none of the services had been rendered by plaintiff after June 8, 1930, six years before the motion to amend the complaint, made June 8, 1936.

[1] The first point is frankly an effort to persuade us to overrule what we decided on the second appeal; especially because of McGovern v. New York, 272 N. Y. 455, 3 N. E. 2d 866. The language of the statute there involved was not literally the same as § 89(21) of the Village Law, but nothing turns on the difference. If the original complaint at bar for damages for breach of contract was the same "action" as that in which the judgment was rendered, the plaintiff never fulfilled the necessary condition precedent of "presenting" a "bill or account" before "bringing" his "action" for services rendered. But if the "action" for services was not "brought" until the plaintiff moved to amend the complaint on June 8, 1936, then he did fulfill that condition on April 15, 1936, when he "presented" a "bill or account." He could of course have "submitted to a non-suit" after our first decision (Civil

Practice Act, § 457); and he could then have begun a new action thirty days after April 15th. That would have involved the payment of costs, to be sure, but the defendant could have brought up the payment of costs, and perhaps did, when the plaintiff moved to amend. The question, as we see it, is only whether the plaintiff was forced to proceed in that form, although the practical difference between it and the course he took was nil, since the defendant had exactly the same defences in either event. We do not believe that the law of New York makes crucial so empty a technicality; or that McGovern v. New York, supra, 272 N. Y. 455, 3 N. E. 2d 866, must be stretched so far. That case was very different on its facts. There could be no doubt that the summons was intended to "bring" an "action" upon the "bill or account" that had just been "presented," though it might, and in fact did, include other causes of action as well. There could also be no doubt in the case at bar that the "action brought" on June 12, 1931, did not include services, because the complaint was served along with it. The rule is admittedly a harsh one, and we see no reason to extend it beyond the use for which it was intended, which does not include this situation.

[2] The second question is whether, since the contract of July 2, 1928, was unauthorized when made, because of § 128-a of the Village Law, the plaintiff can recover for any services rendered under it. We have no doubt as to those rendered after September 20, 1928, when the trustees' resolution was ratified. Thereafter, the trustees certainly had authority to present an application to the Water and Power Commission, and to employ competent help in preparing it. The fact that there had been an earlier unauthorized attempt to contract with the person so employed, did not prevent the law from raising an obligation to pay him; contract or no contract, he was in fact employed. It is true that there was no contract implied in fact; the village supposed that its

promise in the express contract was valid and so did the plaintiff; but, it is precisely when both parties are mistaken, that the law raises an obligation ex aequo et bono in its place. Restatement of Restitution, § 53(1) (b). Nevertheless, there is some doubt about the recovery for those services rendered from August 8, 1928, until September 4th and perhaps until September 20th. While it is true that, if the controversy arises between two individuals, the promisee can recover for the whole benefit which the promisor receives, that is not necessarily true in the case of a municipality. Section 128-a may invalidate, not only the attempted contract itself, but any obligation arising out of the transaction, for which the village does not provide in advance; there are authorities seeming to hold that it cannot then make itself liable in any way for such expenses. Donovan v. Mayor, 33 N. Y. 291; McDonald v. Mayor, 68 N. Y. 23, 23 Am. Rep. 144; Wakefield v. Brophy, 67 Misc. 298, 122 N. Y. S. 632, affirmed Wakefield v. Gaynor, 144 App. Div. 905, 128 N. Y. S. 1149, affirmed 207 N. Y. 772, 101 N. E. 1125. We are not perfectly clear that this doctrine is as absolute as these cases make it seem (Coggeshall v. Hennessey, 279 N. Y. 438, 443, 444 18 N. E. 2d 652), but we will assume that it is. We will also assume, contrary to the plaintiff's argument, that the referendum did not ratify the employment either from August 8th, or from September 4th, though it is hard to see why it did not at least ratify the resolution. We may so proceed because the second of the defendant's three points on appeal is that the plaintiff cannot recover anything whatever for services rendered under the "illegal contract"; and that is certainly untrue as to those rendered after September 20th. If so, we need not decide whether the judge was right in letting the jury appraise the services rendered before that day.

[3] The third question is of the Statute of Limitations. The defendant has misunderstood our former ruling. We did not hold that the plaintiff was obliged to prove that he

performed any services within six years of the amendment to his complaint. We said that he was in the same position as an attorney, who need not sue until the job is over; that is, until he has been discharged, or otherwise learns that he will not be required to do anything more. The village never informed the plaintiff that his employment was at an end until February 10, 1931, and he had no reason to speculate as to whether it would further prosecute the application to the commission and go on with the work. At least a jury might have found for him on that issue, so that we cannot say as matter of law that the statute had run when he applied for leave to amend his complaint.

JUL 26 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 140.....

VILLAGE OF HAVERSTRAW,
Petitioner,
against
CLYDE POTTS,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID PAINE,
Attorney for Respondent.

July, 1940.

The Hamilton Press, 58 Stone St., New York City

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition seeks to review the unanimous affirmance by the Circuit Court of Appeals for the Second Circuit (110 Fed. (2d) 58) of the judgment of the District Court for the Southern District of New York upon a jury's verdict, in favor of respondent for $3,500, interest and costs.

Jurisdiction

The grounds for jurisdiction alleged by petitioner are the proceedings below and Section 240 (a) of the Judicial Code, 28 USCA, Section 347, as amended, upon the theory that the decision below has decided a question of local law in conflict with applicable local decisions.

Statement of Action and Decisions Below

This litigation, involving as it now appears $3,500, has been before the Federal Courts nine years. Two trials have been had and three appeals to the Circuit Court of Appeals have been heard.

Respondent, a hydraulic engineer, was employed by petitioner by written contract on July 2, 1928 to render services in connection with the authorization, design and construction of a municipal water supply and distribution system for which respondent was to receive seven per cent of the cost. Respondent prepared the necessary plans for such a system and on September 4, 1928 petitioner's Board of Trustees passed a resolution authorizing the project as planned by respondent. On September 20, 1928 the qualified electors of petitioner approved the action of the petitioner's Board of Trustees. Thereafter, petitioner began a proceeding, as required under the New York Conservation Law, to obtain the approval of the project by the Water Power and Control Commission and respondent rendered services in connection with said proceedings, as all admit. The proceeding was contested by the private water company supplying Haverstraw and surrounding towns. After the first hearing it was adjourned from time to time at petitioner's request, but it lasted for two years, and then petitioner finally abandoned it February 19, 1931. This was occasioned by a change in local administration. The new administration refused to pay respondent anything for services or disbursements.

On June 12, 1931 respondent began an action against petitioner for breach of the written agreement of July 2, 1928 and had a jury verdict of $17,000. Upon appeal the Circuit Court of Appeals (79 Fed. (2d) 102) reversed, on the ground, in sum, that the Village authorities had no power to bind themselves in advance to a contract calling for complete services through the construction of the water works. It was requisite that it have approval of the Commission

before it could construct and that permission might never have been granted. The contract being entire as to consideration, the Court held it could not separate the damages suffered by respondent into two parts, viz., those for services for which petitioner lacked authority to contract, and those where the hiring was authorized.

Therefore, a recovery based upon the written contract was held improper. The Court, however, suggested several times in its opinion (R. 98, 103, 104) in the light of the extensive services which respondent had rendered and of which the petitioner had enjoyed the benefit, that the complaint might be amended to permit a recovery on a *quantum meruit* for services actually rendered, viz.:

> (1) in preparing the requisite engineering data in order that the Village Trustees might determine upon a resolution authorizing such project and a bond issue and of submitting such project and bond issue to the voters; and
>
> (2) in the conduct of proceedings for approval of plans by the New York Water Power and Control Commission.

Thereafter, on April 15, 1936, respondent, in accordance with Section 89 (21) of the Village Law of New York, filed with petitioner itemized bills for his services. More than thirty days thereafter, on June 8, 1936, respondent moved for leave to amend to state a cause of *quantum meruit*. The motion was granted and an amended complaint was served October 10, 1936. Thereafter, upon motion of petitioner, Judge Caffey dismissed the amended complaint upon the ground that the Statute of Limitations was a bar (R. 1).

The Circuit Court of Appeals reversed that order and remanded the cause (93 Fed. (2d) 506; R. 105) for retrial. On February 28, 1938 (R. 2), the petitioner filed its

answer (R. 30) and the case went to trial before Judge Byers and a jury, resulting in the judgment of $3,500, interest and costs here under consideration. Upon petitioner's appeal, the judgment was affirmed. In the court below, the appeal was limited to three questions of law (R. 41) which had been set up as defenses in petitioner's answer, as follows:

> (1) That the filing by the respondent of the notices of claim upon which the action is founded under the amended complaints was an insufficient compliance with the requirements of subdivision 21 of Section 89 of the Village Law;
>
> (2) That no recovery could be had by respondent on *quantum meruit* since the services for which compensation was sought had been rendered pursuant to the unenforceable contract of July 2, 1928, and
>
> (3) That any recovery by the respondent was barred by the Statute of Limitations.

The Circuit Court of Appeals held with respect to (1) that the filing of the bills more than thirty days before the amendment of the complaint sufficiently complied with the statute, since the amendment of the complaint in effect was the commencement of a new action; (2) that it had no doubt respondent might recover on *quantum meruit* for services rendered after the vote of the electors on September 20, 1928 and since petitioner's claim was that respondent could not recover for any services, whether rendered before or after that date, it was unnecessary to decide whether respondent could recover for services rendered prior to September 20th; and (3) that the respondent's services were continuous and that the accrual of the cause of action was a question of fact so that it could not say as a matter of law that the Statute of Limitations had run.

SUMMARY OF ARGUMENT

I. The respondent's bills were filed with petitioner thirty days or more before the action on *quantum meruit* was commenced.

II. The decision below is in accord with New York decisions re Section 128-a of the Village Law.

III. The decision below accords with New York decisions that the approving vote of September 20, 1928, the existence of the power lawfully to employ respondent, supports a recovery for services rendered.

IV. Petitioner's contention that the Court erred in holding that the Statute of Limitations did not bar the action presents no issue for review by this Court.

POINT I

The respondent's bills were filed with petitioner thirty days or more before the action on *quantum meruit* was commenced.

Subdivision 21 of Section 89 of the Village Law provides in part that:

> "* * * no bill or account against the village * * * for * * * services rendered * * * shall be * * * paid, nor shall an action be brought thereon unless such bill or account shall be made out in items, and properly dated with an affidavit attached thereto by the person * * * presenting * * * the same * * *. No action shall be brought upon any such bill or account within thirty days from the time the same was presented to the [Village] board authorized to audit the same."

In this case the respondent filed his bills on April 15, 1936 and more than thirty days thereafter he commenced an action based thereon by amending the complaint on June 8, 1936. Until that date then there had been no

suit on the claim of *quantum meruit* and so the Court held.

McGovern v. *City of New York,* 160 Misc. 714, on which petitioner relies, is not contrary to the result reached below. In that case the plaintiff commenced his action by serving a summons two days after filing his claims. Thirty days subsequent to filing the claims the plaintiff served a complaint. Obviously, the action on that precise claim was commenced within thirty days of the filing of the bills. At p. 715 the Court said:

> "The authorities are uniform to the effect that the purpose of this provision is to permit the city to investigate the validity of the claim and determine whether it desires to pay or settle it without litigation." (Citing cases)

That very purpose would be frustrated if two days after the filing of the claim the suit could be begun as it was in the *McGovern* case, and so the Court said. In the instant case, however, the action on *quantum meruit* was not commenced until more than thirty days had elapsed. True, the action for breach of contract had been begun after proper presentation of the original claim, but the filing of a new claim occurred after the complaint for breach of contract had in effect been dismissed and before permission to amend to a *quantum meruit* was sought and granted. Every protection afforded by the statute was thus granted to the Village.

The petitioner's contention that this *quantum meruit* action was commenced by service of the summons in 1931 in the original action for breach of contract and not by the amendment of the complaint in 1936 is what Judge Hand aptly called "so empty a technicality" (R. 116).

If the *quantum meruit* did not constitute a new cause of action it would have been unnecessary to file a new claim in 1936, since in that case the *quantum meruit* would relate back to the original claim on file. Likewise, the

amended complaint would relate back to the commencement of the original contract action with respect to the Statute of Limitations. The petitioner apparently concedes the truth of this distinction by attempting to assert the Statute of Limitations as a defense, alleging that no services were rendered within six years of the motion to amend the complaint on June 8, 1936 (Petitioner's Br. pp. 4, 23).

This *quantum meruit* action commenced on June 8, 1936, more than thirty days after filing the bills, in complete compliance with the statute on which petitioner relies. That it took the form of an amendment is of no moment. The prolonged discussion of the *McGovern* case by the petitioner does not take into account the distinction so ably presented in the opinion below (R. 116) that respondent could have submitted to a non-suit after the reversal of the judgment on the contract action and could then have begun a new action thirty days after April 15, 1936. The practical difference between that form and the amendment of the complaint was nil since the petitioner had the same defenses in either event. The law of New York does not make crucial, empty technicalities of form when the protection afforded by the statute has been amply assured. Statutes should be given a reasonable interpretation in the light of their purposes. (*People* v. *Ryan*, 274 N. Y. 149, 152.)

The object of filing claims with the municipality is to insure an opportunity to examine the claims and decide whether to defend or not. That purpose was served by the filing here as set forth, but it was not served by the two-day notice given by the claimant in the *McGovern* case. The present case is clearly governed by the language of Judge Lambert in *Vermeule* v. *City of Corning*, 186 App. Div. 206, 210:

> "No complaint having been made to the form of the claim when presented, we must assume, there-

fore, that it accorded to the common council all the information that body desired, and was a sufficient compliance with the technical requirement of the statute." (Affirmed 230 N. Y. 585)

POINT II

The decision below is in accord with New York decisions re Section 128-a of the Village Law.

The burden of petitioner's argument is that Section 128-a of the Village Law had not been complied with when the contract of July 2, 1928 was made, as if this were an action for a breach of contract. Such an argument based on a misconception of the action on *quantum meruit* also overlooks the vital fact that Section 128-a was fully complied with when the electors voted to approve the resolution of the Trustees authorizing the water system (R. 39, 54, 56; Petitioner's Br. p. 2), as the Circuit Court of Appeals pointed out in its first opinion (R. 100, 104). The argument proceeds further that because the services were rendered in attempted compliance with the unenforceable contract of July 2, 1928, recovery in *quantum meruit* would defeat the purposes of Section 128-a despite the vote of September 20th. Of course, the respondent thought he was carrying out his contract when he rendered services. When he sued for breach of the contract, i. e., for his 7 per cent commission, he learned for the first time that the contract was invalid. His judgment of $17,000 was reversed. The instant suit is not under that contract at all. It is simply for the value of certain services. This resulted in a verdict for only $3500. This argument forced petitioner to the position adopted at the trial (R. 39, 40) and in the Circuit Court of Appeals (Petitioner's Br. p. 4) that respondent was not entitled to recover for any services whether rendered before or after September 20th. The Circuit Court quite properly held

the argument unsound; the vote of September 20th was compliance with the statute (R. 117).

This basic misconception of the nature of the action and the vote of September 20, 1928 totally vitiates petitioner's contentions as expressed in its Points II and III. In none of the cases cited does it appear that there was an eventual compliance with the statute involved after an earlier and ineffectual attempt to contract in violation of it. Thus, in *McDonald* v. *Mayor,* 68 N. Y. 23, greatly relied upon by petitioner, it clearly appears that at no time did the head of the Department of Public Works certify to the necessity of the purchase of materials, or that at any time the expenditure was authorized by the Common Council, or that the contract was let pursuant to sealed bids, all of which was required by the statute as pointed out in the opinion of the Court (pp. 25 and 26).

Cases in the Footnote (Petitioner's Br. p. 14) are equally beside the point. Cases in other jurisdictions cited by petitioner can have no application to its contention that the decision of the court below is contrary to New York decisions.

Dickinson v. *The City of Poughkeepsie,* 75 N. Y. 65, required letting of a contract to a low bidder, a qualification which Dickinson was unable at any time to fulfill.

The claim that the decision in the *McDonald* case *supra* outlaws all attempts to recover from a municipality where statutory requirements have not been met, was made and rejected in *Mixer* v. *Adam,* 66 Misc. 238, affirmed 140 App. Div. 919, where it was held that a taxpayer could not enjoin the city from paying the fair value of paving blocks furnished to it pursuant to a contract which did not meet the requirements of the statute. The Court (White, J.) said (pp. 240-241):

> "Carelessly read, some of the cases cited by the plaintiff might seem to sustain his contention, notably the case of McDonald *v.* City of New York,

68 N. Y. 23, in which the opinion of the court is somewhat foggy. A careful judicial examination of that case, however, shows it to be in fact an authority in favor not only of the right but the duty of the city to pay the claim in question. The reason for this statement as to the McDonald case is that in the opinion of the court in that case reference is made to the opinion of the same court, that is, the Court of Appeals, in the case of Nelson *v.* City of New York, 63 N. Y. 535, where the following language was used: 'If the city obtains property under a void contract and actually uses the property and collects the value of it from the property owners by means of assessments, the plainest principles of justice require that it should make compensation for the value of such property to the person from whom it was obtained.' The court in the McDonald case said that the above quoted words distinguished those two cases, and uses the above quoted language with approval and as the law to be recognized in all similar cases; and the case at bar comes squarely within the rule there laid down."

The dicta in *Lindlots Realty Corp.* v. *County of Suffolk*, 278 N. Y. 45 and *Scarborough Prop. Corp.* v. *Village of Briarcliff Manor*, 278 N. Y. 370, are concerned with the unauthorized exercise of power by minor officials, a proposition not involved in this action. The purpose of Section 128-a obviously is to restrict the power of the village to enter into contracts and incur financial obligations unless appropriation is made therefor in the budget or by resolution of the Trustees, approved at a permissive referendum. These conditions are interposed so that the taxpayers may know what the Trustees are doing with public funds. The purpose of the statute was fully complied with when the electors voted on September 20, 1928 to authorize the issuance of $450,000 in bonds for the construction of a water system, and its incidental engineering expenses (R. 39, 58; Petitioner's Br. p. 2).

POINT III

The decision below accords with New York decisions that the approving vote of September 20, 1928, the existence of the power lawfully to employ respondent, supports a recovery for services rendered.

The proposition urged by petitioner in its Point III is new-born. No such claim was made in the Circuit Court of Appeals or the District Court. It is made now only because of the fault inherent in petitioner's argument rejected by the Court below (R. 117), i. e., that in no event could respondent recover for any services whether rendered before or after September 20th (R. 41). The radical departure in the second specification of errors set forth in petitioner's brief (p. 8) from the questions considered below is apparent from the opinion of Judge Learned Hand, who said that the Court could assume that the referendum on September 20th did not ratify the employment

> "because the second of the defendant's three points on appeal is that the plaintiff cannot recover anything whatever for services rendered under the 'illegal contract'; * * *." (R. 117)

Since this Court, on certiorari, will not consider petitioner's contentions which it failed to assign as error in the Circuit Court of Appeals (*Sonzinsky* v. *United States*, 300 U. S. 506; *Various Items* v. *United States*, 282 U. S. 577; *Burnett* v. *Commonwealth Improvement Co.*, 287 U. S. 415), it is difficult to see how this belated argument can aid the petition for certiorari. It will, however, be briefly discussed.

Admittedly, the vote of September 20, 1928, pursuant to Section 128-a, authorized the petitioner's Trustees to proceed before the Water Power and Control Commission; respondent rendered services before the Commis-

sion as well as in assisting the Village Trustees in determining upon a resolution authorizing the project, etc. It is, therefore, not pertinent to argue that the contract of July 2, 1928 was in violation of Section 128-a. For after the vote on September 20th approving the Trustee's resolution of September 4th, Section 128-a no longer applied.

The petitioner proceeds upon a false premise—that a person can be employed only by written contract. The absurdity of this notion is plain. A contract for employment may be express, oral or implied. While the express contract of July 2, 1928 may not have been enforceable because of Section 128-a, the respondent's services in assisting the petitioner to comply with that section created an implied contract under which respondent is entitled to recover for assisting the Village in determining upon the resolution. When on September 20th the resolution was adopted by the electors, Section 128-a was fully complied with and the value of respondent's subsequent services before the Commission were recoverable on implied contract. Thereafter, Section 128-a had no application, as was pointed out in both the first and third opinions of the Circuit Court (R. 103-104, 117).

Petitioner misconceives both the necessity for and the theory of ratification. It was not necessary that the vote of September 20th ratify the contract of July 2nd. The judgment, which the petitioner contests, was not based upon a contract but on *quantum meruit* only for the value of the services which were authorized.

The case of *Coggeshall* v. *Hennessey,* 279 N. Y. 438, is decisive on this point. Here the town of Mount Pleasant retained an attorney to conduct litigation over a purchase of certain land and water rights. The litigation lasted four years. Then the attorney submitted a bill for services. An item to cover this bill was inserted in the budget. In an action brought by a taxpayer, it was argued that the Town Law required that no indebtedness could be

incurred unless it was included in the estimate for that year, or, in other words, that each year of continuous litigation the estimate must include the fees and allowance for counsel estimated in advance.

Section 118 of the Town Law is the provision for towns comparable to Section 128-a of the Village Law, and it requires that no liability may be incurred

> "unless provision therefor shall have been made in the annual estimate, and in no case in excess of the amount appropriated for such year. * * * Any contract, verbal or written, made in violation of this section, shall be null and void as to the town * * *."

Since the services were rendered by the attorney in the years prior to the estimate, it was contended that the attorney could not be paid. The Court of Appeals rejected the argument, saying at page 444 (Crane, Ch.J.):

> "We do not construe this law as requiring any such strict construction. The value of the services performed in one year could be included in the budget for the next, provided they are reasonable."

The only difference between Section 118 of the Town Law and Section 128-a of the Village Law is that in addition to previously estimating the money for a liability, an alternative method is provided in the latter by a resolution which may be approved by the electors. In the case at bar the alternative method was used and it is clear that the election on September 20th constituted compliance with the statute.

In addition, petitioner's argument that *the contract* was not submitted to the electors is specious. Section 128-a does not require that a contract be submitted, but merely that a resolution to borrow money be approved and this admittedly was done.

Nothing in petitioner's brief indicates that the Court below departed from the New York decisions. The cases

cited dealing with instances where there was no compliance with the statute are not in point. At page 19 of its brief, petitioner emphasizes that the Court below cited no authorities for its statement that "the earlier unauthorized attempt to contract with the person so employed did not prevent the law from raising an obligation to pay him * * *." This is so well known that no citation was justified. Authorities for it are in all the books.

For example, *Vermeule* v. *City of Corning,* 186 App. Div. 206; affirmed 230 N. Y. 585. There the plaintiff rendered services to the City in connection with its water supply at the request of the Board of Public Works. After the completion of the services the City refused to pay. The Court (Lambert, J.) held that in fact the Board of Public Works had no authority to employ the plaintiff and that its expenditures were limited to moneys appropriated by the Common Council. The Court assumed that the plaintiff's contract was unenforceable and void, but it held that the Common Coucil had the right to employ an engineer to perform the services which were rendered by plaintiff. At pp. 208-09 the Court said:

> "* * * the common council, although not initiating the contractual arrangement, having power to do so, had the power to adopt the action of the board of public works and ratify the contract thus sought to be made.
>
> * * * * *
>
> "Under these circumstances, the municipality having received the benefits of plaintiff's services should pay the agreed sum therefor, unless some reason sound in law prohibits its recovery."

Whereupon the Court reversed the judgment below and directed judgment for the plaintiff for the full amount, and this, as already stated, was unanimously affirmed by the Court of Appeals.

Peterson v. *The Mayor of New York,* 17 N. Y. 449, confirms the doctrine already stated. There an architect was

employed by the Committee on Markets of the Board of Aldermen to draw plans for a new market. They were presented to the Common Council and a resolution passed authorizing the erection of the market upon the plans. The suit was for services. The Court held, per Denio, J., that the Committee had no authority to employ the plaintiff but that the Council had adopted the plans and put them in use providing for the erection of the building, and the City must pay for them. He wrote (p. 453):

> "Assuming then that these services might have been lawfully performed at the expense of the city, by a person directly employed by resolution of the common council, and that they have, in fact, been performed by the plaintiff, under an officious employment by a committee of one of the boards, the question is, whether the adoption of the plans, and using them to the extent which has been shown, binds the city to pay for them. * * * Chancellor Kent says, the doctrine that corporations can be bound, by implied contracts, to be deduced by inference from corporate acts, without either a vote or deed or writing, is generally established * * * with great clearness and solidity of argument (2 Comm., 291)."

To the same effect:

> *People* v. *Flagg,* 17 N. Y. 584, 587;
> *Nelson* v. *Mayor,* 63 N. Y. 535;
> *Moore* v. *Mayor,* 73 N. Y. 238, 248;
> *Matter of Shaddock* v. *Schwartz,* 246 N. Y. 288, 294.

It is a rule of everyday honesty that when one renders services and incurs expenses in good faith relying on an apparently valid agreement, he shall not be turned away empty handed. He can sue for and recover the value of his services even though the Court cannot enforce the agreement itself.

POINT IV

Petitioner's contention that the Court erred in holding that the Statute of Limitations did not bar the action presents no issue for review by this Court.

The petitioner does not seriously urge that the holding of the Court below with respect to the Statute of Limitations is in conflict with applicable New York decisions. Indeed, the petitioner resorts to the argument that a continuing employment cannot be implied.

The only case cited for this proposition is *Thacher* v. *N. Y., W. & B. R. Ry. Co.*, 153 App. Div. 186. This case has no bearing here. It involved a contract absolutely "void under the Statute of Frauds" (153 App. Div. 189-190) which was sought to be made the sole basis of recovery in *quantum meruit* for the very same damages which would have been recoverable in an action on the contract itself. Furthermore, in order to escape the bar of limitations by proof of continuous services within the statutory period, plaintiff offered no evidence other than the illegal contract itself.

In the case at bar no reliance was placed on the contract of July 2nd, either as establishing the measure of respondent's damages or for the purpose of tolling the Statute of Limitations. In fact, a long trial was necessary for the presentation of evidence *aliunde* the contract covering these many points. This evidence was commented on by Judge Byers in his charge (R. 75, et seq.).

Judge Byers charged the jury (R. 70-72) that there was no written contract involved, but that the jury might find that there was an implied contract and that the jury could not find for the respondent unless they also found that his services continued until February 19, 1931 (R. 73-74).

Thus, the jury found, as a matter of fact, that the

respondent's services continued until 1931. The undisputed evidence sustained this (R. 42-53). The Circuit Court of Appeals affirmed (101 Fed. (2d) 58). This was simply a question of fact resolved against petitioner both by the jury and the Circuit Court of Appeals. It is not an open question on an application for certiorari.

General Talking Pictures Corp. v. *Western Electric Co.,* 304 U. S. 175;
United States v. *O'Donnell,* 303 U. S. 501;
United States v. *State Investment Co.,* 264 U. S. 206.

CONCLUSION

The petition is without merit and should be dismissed.

Respectfully submitted,

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